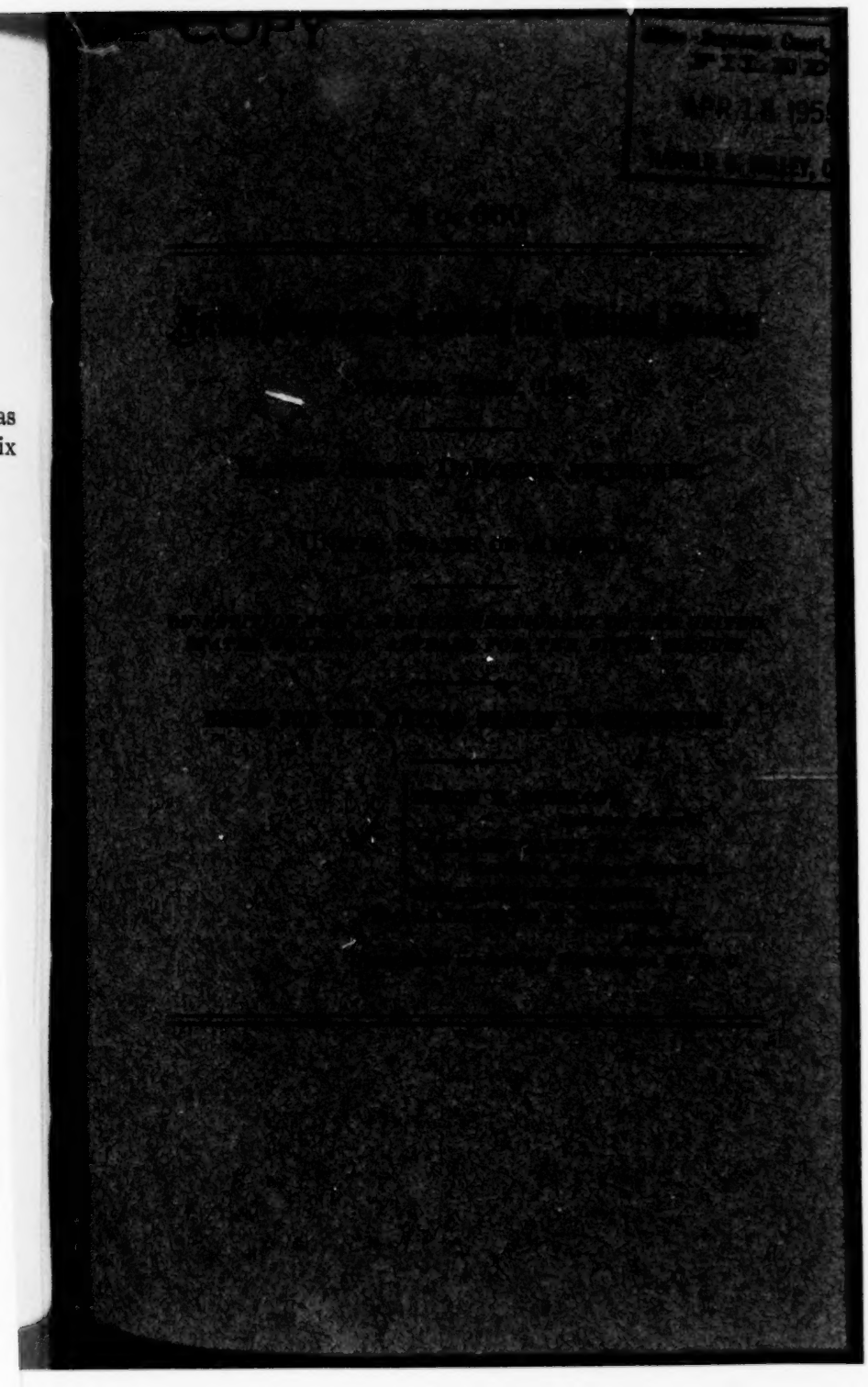

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In the Supreme Court of the United States

OCTOBER TERM, 1954

No. 660

HARVEY GEORGE DEROSIER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (Pet. 17–23) is reported at 218 F. 2d 420.

JURISDICTION

The judgment of the Court of Appeals was entered on January 18, 1955, and a petition for rehearing was denied on February 18, 1955. The petition for a writ of certiorari was filed on March 18, 1955. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether, when false statements are prepared, sworn to and forwarded in one judicial district to a government department in another judicial district, the offense is commenced in one district and completed in another, so that it may be prosecuted in either district under 18 U. S. C. 3237.

2. Whether, in a prosecution for having made false statements to a federal loyalty board respecting charges that petitioner belonged to a specific Klavern, which was shown at the trial to have been associated with a specific Ku Klux Klan organization on the Attorney General's list for the federal employees' loyalty program, it was necessary for the court in instructing the jury to define the nature of the organizations on the list.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Article III, Section 2, of the Constitution provides, in pertinent part:

> The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed * * *.

The Sixth Amendment of the Constitution provides, in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public

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> trial, by an impartial jury of the State and district wherein the crime shall have been committed * * *.

Title 18, U. S. C., Section 1001, provides:

> Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000, or imprisoned not more than five years, or both.

Title 18, U. S. C., Section 3237, provides in pertinent part:

> Except as otherwise expressly provided by enactment of Congress, any offense against the United States begun in one district and completed in another, or committed in more than one district, may be inquired of and prosecuted in any district in which such offense was begun, continued, or completed.

* * * * *

STATEMENT

Petitioner, an employee of the United States Post Office Department, was convicted in the Southern District of Florida on both counts of a

two-count indictment charging violations of 18 U. S. C. 1001 (R. 12). He was sentenced to imprisonment for ninety days (R. 22–23). On appeal, the judgment was affirmed (Pet. 17–23).

1. The indictment alleged that petitioner was a Post Office employee subject to the jurisdiction of the Post Office Department Loyalty Board in its administration of the federal employees' loyalty program; that under this program membership in the Ku Klux Klan and various of its branches was one of the factors to be considered in determining loyalty; and that on July 12, 1951, a "Notice of Proposed Removal Action" was sent to petitioner which charged that from 1950 he had been a member of and held office in the J. B. Gordon Klavern of the Ku Klux Klan (R. 1–2). The first count charged that in his answer to this notice petitioner made false statements concerning his membership and activities in the John B. Gordon Klavern, which answer he had forwarded from Florida to the Loyalty Board (R. 3, 5). The second count charged that petitioner had attached to this answer a false document, knowing it contained false statements (R. 5–7). Petitioner's motion to dismiss the indictment, on the ground that the offense could be tried only in the District of Columbia (R. 8), was denied (R. 10–12).

The pertinent evidence may be summarized as follows:

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Pursuant to Executive Order 9835 the Attorney General of the United States had prepared a list of subversive organizations for the use of the various government departments, including the Post Office Department, in the administration of the loyalty program (Gov. Ex. 6; R. 60–61, 179–185). Included on this list were the Association of Georgia Klans, the Ku Klux Klan, the Original Southern Klans, Inc., and the Associated Klans of America (Gov. Ex. 6, R. 60, 185).

On July 12, 1951, the Post Office Department Loyalty Board forwarded to the petitioner a "Notice of Proposed Removal Action" (Gov. Ex. 2; R. 54–55, 161–164), which included specifications that:

> (1) From 1950 petitioner had been a member of the J. B. Gordon Klavern of the Ku Klux Klan and had been active in its affairs;
>
> (2) During his membership in the Ku Klux Klan he was in charge of assembling information concerning any person or organization opposed to the Klan;
>
> (3) In December 1950, at a regular meeting of the J. B. Gordon Klavern he had been elected to the office of Kludd (Chaplain) for this Klavern; and
>
> (4) He regularly attended meetings of the J. B. Gordon Klavern of the Ku Klux Klan.

The notice explained the procedures of the Board, stating, among other things, that peti-

tioner had a right to answer the charges and to have a hearing if desired. He was advised that his answer should be addressed to the Loyalty Board of the Post Office Department and sent to E. B. Jackson, Chairman, in Washington, D. C. (*Id.* at R. 163.)

On August 18, 1951, petitioner prepared an answer, in the form of a letter, addressed to Chairman Jackson, of the Post Office Department Loyalty Board, Room 4406, Post Office Department, Washington 25, D. C. (Gov. Ex. 3; R. 55–57, 165–168). The answer was sworn to before a Notary Public in Hialeah, Florida, on the same date (R. 68, 168). In it petitioner stated that in April 1950, he had joined an organization called Sports, Inc., that during the initiation ceremony he realized that Sports, Inc., was a Klan organization, that he immediately resigned, that he never attended any Klan meetings and never engaged in any of their undertakings whatsoever (R. 165–168). This was the document described in the first count of the indictment.

To support his claim that he had resigned as soon as he realized that he had joined a Klan organization, petitioner submitted with his answer a purported letter of resignation, dated May 1, 1950, directed to Sports, Inc. (Gov. Ex. 4; R. 57, 168–169), the body of which read as follows:

> Since becoming a member of Sports, Inc., I have every reason to believe that

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> your organization is in some way connected with the Ku Klux Klan, [sic] Had I known this before my initiation I would never have become a member.
>
> Therefore, you may accept this notice as my resignation from Sports, Inc., and any other organization you may represent including the Ku Klux Klan.

Petitioner admitted that he had rewritten the letter, which formed the basis of the second count, after he had received the "Notice of Proposed Removal Action" (R. 127–128).

Both documents were received by the Post Office Department Loyalty Board on August 20, 1951 (R. 58–59).

Petitioner admitted that he had sworn to and made a false statement to the Loyalty Board (R. 126–127), and that during the month of April 1950, he had joined the John B. Gordon Klavern (R. 124). At that time the Klavern was affiliated with the Association of Georgia Klans and was so affiliated for three or four months thereafter (R. 92). At a later date this Klavern became affiliated with the Southern Knights of the Ku Klux Klan (R. 79, 93). Petitioner attended meetings of the John B. Gordon Klavern (R. 74, 84, 94), was appointed and acted as librarian (R. 78, 97), was elected as Kludd (Chaplain) at a meeting on December 13, 1950 (R. 97, 98, 99), and was installed in this office at a meeting on January 10, 1951 (R. 101, 102).

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2. In its charge to the jury, the trial court stated, *inter alia,* that the Post Office Department Loyalty Board had jurisdiction to inquire only into petitioner's membership in organizations which had been designated by the Attorney General as subversive; that the list included Associat[ed] Klan of America, Association of Georgia Klans, Ku Klux Klan, and Original Southern Klans, Incorporated; that membership in any other organization than these four would be here immaterial; and that any false answers which petitioner may have made regarding membership in any other organization could not be a basis of guilt in this case (R. 155). The court thereupon stated (R. 156):

> The Court further charges the jury that if you find that the John B. Gordon Klavern mentioned in the indictment was a Ku Klux Klan organization within the definition of any of the organizations included in the Attorney General's list, as already mentioned to you, then the Board had jurisdiction to make a proper inquiry of the defendant concerning his membership in it.

As regards this part of the charge, petitioner noted an exception "to so much of the Court's instruction as instructed the jury that they could find that the John B. Gordon Klavern was a Klan organization within the meaning of the organizations designated by the Attorney General as being subversive" (R. 160).

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ARGUMENT

The decision below is clearly correct and is in complete harmony with the applicable decisions of both this Court and of the Circuits. No unresolved question of importance is raised and there is no occasion for further review. Petitioner's assertion of a conflict as regards the venue issue is without merit, since the cases on which he relies are properly distinguishable both on the facts and on the applicable law.

1. *The venue issue.*—This case was brought in Florida, where petitioner resided and was employed, and where he prepared and dispatched the false answer to the Loyalty Board in Washington, D. C. Every witness called by the government and by the defense in the trial of the case resided in Florida with the single exception of one government witness called from the Post Office Department in Washington to identify the pertinent documents from the official files (R. 51–65). Nevertheless, petitioner contends (Pet. 7–13) that the crimes with which he was charged could have been committed, within the meaning of the venue requirements, only at the place to which the answer was sent (i. e., Washington, D. C., 1,200 miles away) and hence that his motion to dismiss the indictment (R. 8) should have been granted. It is the government's position, which was sustained by both courts below, that the offense was commenced by the acts of the petitioner commit-

ted in the Southern District of Florida and completed by the filing of the false documents with the Post Office Department in Washington, and that therefore the offense could be tried in either district under 18 U. S. C. 3237, *supra*, p. 3.

Certainly, in a practical sense, when a false document is executed and forwarded from one district to be delivered in another, the crime has been commenced in the first district and completed in the second. The falsity which is the gist of the offense has been completed, the document has been sent on its way, and, except in the most extraordinary circumstances, the crime will be completed without anything further being done by the defendant. The situation is essentially the same as that where a shot fired in one district reaches its mark in another. Conceivably, after the shot is fired, some force may deflect it so that it never will reach its mark, just as it is possible that a letter may not be delivered. However, where the shot does reach its mark, or the letter does reach its destination, and the crime is completed, it is a crime which has been begun in one district and completed in another. By the shooting or the mailing, the defendant has done the last act which he can do.[1]

---

[1] It is unnecessary in this case to determine how far back beyond the point of transmission the commencement of the crime can be said to have begun. Cases cited by petitioner (Pet. 8–9) such as *Reass* v. *United States*, 99 F. 2d 752 (C. A. 4), and *United States* v. *Borow*, 101 F.

Such a construction makes it unnecessary, in cases of this character, to subject a defendant to the hardship of a trial in an environment alien to him, remote from his home and from appropriate facilities for his defense. It thus squarely accords with the spirit of Article III, Section 2, of the Constitution, as reinforced by the Sixth Amendment. As this Court said in *United States* v. *Johnson*, 323 U. S. 273, 276:

> Questions of venue in criminal cases, therefore, are not merely matters of formal legal procedure. They raise deep issues of public policy in the light of which legislation must be construed. *If an enactment of Congress equally permits the underlying spirit of the constitutional concern for trial in the vicinage to be respected rather than to be disrespected, construction should go in the direction of constitutional policy even*

Supp. 211 (D. N. J.), holding that mere preparation of a document is not the commencement of the crime, are thus wholly inapposite. Whatever may be the correct rule as to acts of this character, where a defendant could have changed his mind and decided not to send the document, the situation is different where a letter is mailed and therefore the crime actually started on its way toward completion. *Wampler* v. *Snyder*, 66 F. 2d 195, 196 (C. A. D. C.), is also inapposite, for there the question at issue was whether the defendant, residing in Washington, D. C., could be tried in Maryland, the district where his tax return had to be filed. The court was not called upon to decide whether the petitioner in that case could also have been tried in Washington.

though not commanded by it. [Emphasis added.] [2]

In this case both the District Court and the Court of Appeals properly followed the mandate contained in *United States* v. *Johnson, supra,* and construed 18 U. S. C. 3237 in the direction of the constitutional policy for trial in the vicinage.

This construction is clearly supported by decisions of this Court. In *In re Palliser,* 136 U. S. 257, 265–266, and *Burton* v. *United States,* 202 U. S. 344, 381–388, this Court, although dealing with prosecution at the place of receipt, indicated that where corrupt proposals are made to government officials through the mail, the offense is subject to the dual venue statute as a crime commenced in one district and completed in another. Lower courts have likewise held that the dual venue statute applies where false documents are mailed, *Bridgeman* v. *United States,* 140 Fed. 577, 591 (C. A. 9); *United States* v. *Downey,* 257 Fed.

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[2] See also *Hyde* v. *Shine,* 199 U. S. 62, 78, where the Court said:

"* * * But we do not wish to be understood as approving the practice of indicting citizens of distant States in the courts of this District, where an indictment will lie in the State of the domicil of such person, unless in exceptional cases where the circumstances seem to demand that this course shall be taken. To require a citizen to undertake a long journey across the continent to face his accusers, and to incur the expense of taking his witnesses, and of employing counsel in a distant city, involves a serious hardship to which he ought not to be subjected, if the case can be tried in his own jurisdiction."

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366, 367 (D. R. I.); see also *United States* v. *Uram,* 148 F. 2d 187, 190 (C. A. 2). The Court of Appeals for the Fourth Circuit, which, in *Reass* v. *United States,* 99 F. 2d 752 (discussed in footnote 1, *supra,* p. 10) seemed inclined to the view that the offense of filing a false statement can be committed only in the district where the document must be filed, has held that where an offense, such as evading income taxes, involves more than mere filing, the offense can be commenced in the district where acts of concealment occur even though the return is required by law to be filed in another district. *Beaty* v. *United States,* 213 F. 2d 712, 715 (C. A. 4); see also *Newton* v. *United States,* 162 F. 2d 795, 796 (C. A. 4), certiorari denied, 333 U. S. 848. To the same effect see *United States* v. *United States District Court,* 209 F. 2d 575 (C. A. 6).

Petitioner's contention that the decision below is in conflict with *United States* v. *Lombardo,* 241 U. S. 73, fails to note that there the offense charged was the *failure to file* a document which the law required to be filed with the State Department in Washington, D. C.[3] Prosecution was

[3] Petitioner was here indicted under 18 U. S. C. 1001, which prohibits, *inter alia,* "knowingly and wilfully * * * mak[ing] false * * * statements" "in any matter within the jurisdiction of any department * * * of the United States". Thus, the offenses for which petitioner was found guilty, unlike an offense involving a mere *failure to file,* were "begun in one district and completed in another". 18 U. S. C. 3237.

attempted in the state where the defendant resided. The court held that "failure to file" was an offense which could be committed only at the place where the filing was required. It took pains, however, to make a distinction between such a case and one where some positive act is committed in a district other than the one in which the filing is required. In this connection the Court said, at p. 77:

> Undoubtedly where a crime consists of distinct parts which have different localities the whole may be tried where any part can be proved to have been done; or where it may be said there is a continuously moving act commencing with the offender and hence ultimately consummated through him, as the mailing of a letter * * *.

See also *New York Central & H. R. R. Co.* v. *United States*, 166 Fed. 267, 270 (C. A. 2), where it was said:

> But the failure to file a rate schedule with the Interstate Commerce Commission is in no sense a continuous offense running into different districts. The offense consists in the failure to do a single act in a single place, to wit, to file a schedule in Washington. * * * The case is not at all analogous to the offense of presenting a false claim in one district which was prepared in another. There the unlawful preparation might well be considered an essential part of the unlawful presentation, and the com-

mission of the offense as having been commenced where the preparation took place.

Petitioner also contends that the decision below is in conflict with *United States* v. *Valenti*, 207 F. 2d 242 (C. A. 3). That case arose out of an affidavit filed with the National Labor Relations Board pursuant to Section 9 (h) of the Taft-Hartley Labor Management Relations Act, 61 Stat. 136, 146, 29 U. S. C. 159 (h), which provides that no investigation shall be made by the Labor Board unless the required affidavit "is on file with the Board." The court there held that since under the specific terms of that statute the Board had no jurisdiction over the subject matter until the affidavit was on file, the affidavit was not a matter within the jurisdiction of the Board until the filing was actually accomplished. Hence, jurisdiction would be only in the district where the affidavit was filed.

This case is wholly different from the *Valenti* case. Here the jurisdiction of the Loyalty Board did not depend upon the filing of an answer. The Board already had jurisdiction of the case and had exercised it by serving on petitioner the "notice of proposed removal action." The Board could have disposed of the case in the absence of an answer. This case is thus closer to the income tax evasion cases cited above than it is to *Valenti*.

2. *The jury charge issue.*—The "notice of proposed removal action" which was sent to peti-

tioner referred specifically to petitioner's membership from 1950 in the John B. Gordon Klavern, although describing it as a Klavern of the Ku Klux Klan (Gov. Ex. 2; R. 54–55, 161–164). Petitioner, in his answer, stated that he had belonged in 1950 to an organization called Sports, Inc., and had resigned therefrom as soon as he realized that it was a Klan organization, and that he had never attended any Klan meetings (Gov. Ex. 3; R. 55–57, 165–168). The answer, read together with the charges, can be interpreted only as a denial that petitioner ever belonged to the John B. Gordon Klavern. Under these circumstances, the falsity of petitioner's answer and of the accompanying document were sufficiently established by proof that he had taken an active part in the John B. Gordon Klavern (R. 94–99, 106–107, 129) and that he had rewritten the letter of resignation long after its purported date, and irrespective of his continued affiliation with the Klavern (R. 127–128). One who has given false answers to a government agency has no standing to question the authority of the agency to demand the information. "It does not lie with one knowingly making false statements with intent to mislead * * * to say that the statements were not influential or the information not important." *Kay* v. *United States,* 303 U. S. 1, 5–6; see also *United States* v. *Kapp,* 302 U. S. 214.

The court did, however, instruct the jury that the Loyalty Board "would have jurisdiction to make inquiry as to the membership of the defendant only in such organizations as had been designated by the Attorney General as subversive" (R. 155); that the Association of Georgia Klans, among others, was on that list (R. 155); and that in order for the Board to have jurisdiction, it must find that the John B. Gordon Klavern "was a Ku Klux Klan organization within the definition of any of the organizations included in the Attorney General's list, as already mentioned" (R. 156, see also R. 157–158). Petitioner's argument, that the court should have gone further and defined to the jury the nature of a Klan organization (Pet. 13–15), has no merit. We doubt that the issue of the Board's jurisdiction to make the inquiry was a matter to be submitted to the jury at all; it would seem to be, like the issue of materiality in a perjury prosecution, a question of law for the court. In any event, it was certainly enough to establish the jurisdiction of the Loyalty Board to make the inquiry that the Association of Georgia Klans was on the Attorney General's list, and that there was evidence the John B. Gordon Klavern belonged to the Association of Georgia Klans. It was therefore sufficient for the jury to be required to find that the Gordon Klavern belonged to one of the organizations on the Attorney General's list.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

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